United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6133

ORIGINAL

To be argued by
JOHN J. ABT

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL R. BROWN, UNITED STATES TELEPHONE CO.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Other Authority Cited

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I.

The lack of evidence of "value".

The Government acknowledges (Br. 3-4, 11) that the value of the telephones to be determined in this proceeding is their "domestic value" as defined in 19 C.F.R. section 162.43(b). It follows that Haroian's definition of value (quoted in Govt. Br., p. 8) on which he purported to base his appraisal was erroneous in the three respects pointed out in our principal brief, p. 12. The Government, nevertheless, undertakes to defend the appraisal on three grounds.

1. Notwithstanding that Haroian employed the wrong formula, it is urged that he arrived at the right result. Concededly, he did not base his appraisal on a finding as to the market value of the telephones at the date and place of entry "in the same quantity or quantities as seized" or subject to seizure as required by the regulation. But, says the Government (Br. 13-14), the quantities subject to seizure "contained an average of several hundred of each model," and Haroian relied on price lists which "Brown testified were used by large customers" who, "it is reasonable to assume," would place orders for several hundred of each model. *Ergo,* the Government triumphantly concludes, its valuation "was premised on precisely the price at which 'the quantities seized' were sold." The Government's argument displays its cavalier disregard for the terms of the regulation and the evidence in this case.

In the first place, the regulation does not permit an appraisal arrived at by averaging the quantities contained in 50 entries made over a four year period. It calls for an appraisal of the quantity contained in each separate entry at the market value of that quantity at the time and place of entry. It was incumbent on the Government, for example, to prove the market value of a quantity of 4200 Contessa model telephones at the Port of New York on August 28, 1968, the date of their entry (A. 164a, item 30) and to make similar proof for each of the other entries.

Second, Brown did *not* testify that the price lists on which Haroian based his appraisal "were used for large customers." To the contrary, his undisputed testimony (which the court below found "reasonable") was that the price lists were for sales of one or two instruments to small retailers and that 85% to 95% of defendants' sales were to large buyers, including Macy's, at prices substan-

tially below list (A. 93a-100a, 114a, 172a. See Defts. Br. 7, 15).

Thus the law and the facts leave no room for the Government's idle speculation, which is without support in the findings below, that the price lists represent the value of the telephones as defined in the regulation.

2. A recurrent theme in the brief for the Government (pp. 8, 12, 13) is that, lacking the defendants' cooperation, it did the best it could with the evidence at hand. If it failed to do better, the argument runs, the fault is the defendants' in failing to volunteer production of their sales records. But a party has no obligation to assist in satisfying his adversary's burden of proof—that is what subpoenas and discovery are for. Nor is it true that the defendants' records were "the only source" (Govt. Br. 12) of the prices they received. This information was equally available from their customers whose identity, unknown to the Government, could have been ascertained with minimal investigative effort.

Moreover, there is nothing in the record to indicate that the data which the Government complains of lacking would have been helpful to it. It nowhere appears that the defendants' sales records would show sales in the quantities comprised in each of the 50 entries at the date and place of entry. Evidence of quite a different order, such as the expert testimony of large telephone buyers, might be needed to make the proof required by the regulation.

True, proof of value that comports with the regulation may present difficulties. But that fact does not license Government resort to what it calls (Br. 8) "the simple process" of turning to the price lists. Furthermore, any difficulties that the Government might encounter are of its own making in permitting the defendants to make 35 entries during the two years following discovery of the

fraud in July 1966. See Defts. Br. 17. The Government attempts to excuse release of these entries by stating that forfeiture was "unavailable" (Br. 2) because "the fraud was not discovered until sometime after importation" (Br. 2, n.). Typically, this assertion disregards the evidence of the Government's own charts (A. 162a-166a) which establish that only 15 of the 50 entries had been made by July, 1966.

3. The Government seems at times to argue (Br. 3, issue 1; 11, 12) that section 162.43(b) is inapplicable to the merchandise involved in this proceeding. This is so, it is said (Br. 11) because the merchandise "is highly specialized and, more important, imported and offered for sale exclusively by the defendants who created and controlled the wholesale market price."

It should first be observed that if these were the facts and if they made the regulation inapplicable, then Haroian would and should have given them as grounds for substituting his definition of domestic value and his method of making the appraisal for those specified in the regulation. Likewise, the court below would and should have made appropriate findings to justify its adoption of Haroian's definition and method in lieu of the procedure required by the regulation. Absent such testimony and findings, it is apparent that the Government's argument is an afterthought of counsel as a cover-up for the failure of the Government to apply the applicable standard in appraising the merchandise.

Coming to the grounds asserted for the regulation's alleged inapplicability, the fact (underscored by the Government as "important") that the merchandise was imported obviously does not exempt it from a regulation which is concerned with imported merchandise exclusively. Nor does the fact that the merchandise "is highly specialized," whatever that may mean. The statement that

decorator telephones were "offered for sale exclusively by the defendants" is without support in the record as appears from the brief's citations to A. 83a and 59a. The first is to testimony by Brown that telephones similar to his were imported from Denmark for several years prior to 1964. Nothing in the record indicates when, if ever, these imports ceased. The second citation is to testimony by O'Brien that in 1964 he became aware of decorator telephone imports from Japan on which there was a royalty charge by Brown. There is nothing in the record which establishes the absence of Japanese imports by others, either in 1964 or thereafter. Nor is there any evidence which negatives imports from countries other than Denmark and Japan. The further statement that the defendants "created and controlled the wholesale market price" of their imports is sheer invention which the Government does not and cannot document to the record.

Finally, even if the evidence had established and the court below had found that the defendants monopolized the decorator telephone business, that fact would not preclude the existence of a market for such telephones when, in the language of the regulation, "freely offered for sale" in the quanitities subject to seizure. Had the Government proved that there was no market for telephones in the quantity comprised in an entry on the date entered, resort to some alternative method of evaluating that entry might have been held permissible. But there was no such proof.

II.

Limitations

The Government's discussion of the limitations issue is vitiated by its complete disregard of the relevant facts and law. For example, it states (Br. 16) that O'Brien testified that "he had no knowledge of the fraud prior to the receipt of this report [from Japan in October, 1966]." It cites no record reference for this assertion. In fact,

O'Brien testified that he had no evidence of the fraud prior to July 21, 1966, 5 years and two days before the complaint was filed* (A. 64a; Defts. Br. 18-19). Hence, the Government's own evidence establishes the bar of the statute. Again, the Government's insistence (Br. 16, 17) that the defendants bore the burden of proof on the limitations issue flies in the face of the authorities cited in our principal brief, p. 18, which it simply ignores. And see Defts. Br. 20, n. 17.

Respectfully submitted,

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* The Government (Br. 16) repeats the error of the court below in stating that the complaint was filed on July 21, 1971. See Defts. Br. p. 8, n. 7 and pp. 20-21.

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hereby admitted this 3rd day
of May , 1976

Marion L. Bryant
~~Attorney for~~